Supreme Court, U.S.
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92-1741

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ALPINE LAND AND RESERVOIR COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States' failure to adhere to a long-standing agreement to abide by historical practices and customs of water distribution constitutes extraordinary circumstances justifying relief under Fed.R.Civ.P. 60(b)(6).

2. Whether the Court of Appeals improperly substituted its view of the facts for the District Court's findings of fact on the issue of exceptional circumstances.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Ninth Circuit Court of Appeals Opinion has been published. The Ninth Circuit Court of Appeals Opinion is included as Appendix A. The District Court Decision is included as Appendix B.

JURISDICTION

1. The Judgment in the Ninth Circuit Court of Appeals was entered on January 29, 1993.

2. On March 15, 1993, the Ninth Circuit Court of Appeals entered an Order denying Petition for Rehearing filed by Petitioner Alpine Land and Reservoir Company.

3. The Supreme Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Fed.R.Civ.P. 60 is the only rule involved in this case for the purpose of Supreme Court Rule 14(1)(f) and is included as Appendix C.

STATEMENT OF THE CASE

A. Statement of Jurisdiction in the Ninth Circuit Court of Appeals

This case was originally filed in the United States District Court District of Nevada pursuant to Section 24 (First) of the Judicial Code of March 3, 1911, C.231, 36 Stat. 1087, 1091, the predecessor to 28 U.S.C. §1345. The

District Court's Decision, reported at 769 F.Supp. 1142, was rendered on a Petition of Alpine Land and Reservoir Company, Petitioner herein, to amend the Final Decree entered on December 18, 1980.[1]

The District Court Judge entered a Final Decree against the Respondent pursuant to Fed.R.Civ.P. 54. The Court of Appeals had jurisdiction under 28 U.S.C. 1291, as construed, United States v. State of Washington, 761 F.2d 1404, 1406-07 (9th Cir.) cert. denied, 474 U.S. 1100 (1986).

B. Statement of the Case and Facts

Petitioner Alpine Land & Reservoir Company ("Alpine") commenced proceedings in January 1991 to correct an error of fact in the Final Decree

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[1]Pursuant to Supreme Court Rules 14(1)(b) and 29(1), Petitioner certifies that there is no parent or subsidiary company to be listed and that all parties to this supplemental proceeding appear in the caption.

which the United States Court for the District of Nevada had earlier entered in this case on October 28, 1980. The Final Decree erroneously specified as something less (about one-half) than actuality the storage capacities of four very small[2] reservoirs Alpine built, maintained and used for many decades. The 1980 judgment (hereafter "the Final Decree")[3] erroneously

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[2]They are obviously very small, as reservoirs go, containing mere hundreds of acre feet of capacity. By comparison, the capacity of Lahontan reservoir is around 300,000 acre feet. Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364, 370-71 (9th Cir. 1989).

[3]The Final Decree, Findings of Fact, Conclusions of Law, Tabulation and Administrative Provisions ("Final Decree") issued October 18, 1980, was not published in the National Reporter System. However, it constitutes the basic working document for the administration of the decree. A tabulation of Alpine's reservoir rights in the State of

specified about one-half of the actual storage capacities of the reservoirs rather than the increased capacity approved by the California Department of Public Works Division of Water Resources and utilized by Alpine for the past 40 plus years. Alpine petitioned the United States District Court for the District of Nevada on several alternative grounds (including Fed.R.Civ.P. 60(b)(6)) to amend the Final Decree by showing the correct storage capacities of the four reservoirs.

Judge Bruce R. Thompson nevertheless ruled on August 6, 1991, that, of the alternative grounds asserted by Alpine, only Rule 60(b)(6) afforded a legitimate basis for amending the Final Decree and achieving justice in this case. See 769 F.Supp. 1142, 1146. Judge Thompson recognized the res judicata effect the Final Decree would ordinarily have in this case, but found that the "exceptional circumstances" of

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California, the subject of the present dispute, appears on page 145 of the Final Decree.

this case justified relief, in light of applicable authorities, under Fed.R.Civ.P. Rule 60(b)(6). That basis, Rule 60(b)(6), is sufficient to sustain Judge Thompson's decision. The three judge panel of the Ninth Circuit Court of Appeals found that extraordinary circumstances did not exist and on that basis, reversed and remanded. See 984 F.2d 1047. Alpine respectfully submits that this Court should reverse the Ninth Circuit Court of Appeals judgment reversing and remanding Judge Thompson's Decision.

The Decision entered below by Judge Thompson on August 1, 1991, did not change the actual status quo but only legitimized what had been occurring for over 40 years and what should have been and would have been legitimized in 1980 when Judge Thompson entered judgment in this case, but for the extraordinary circumstances described in this Petition.

This case began in 1926 as a quiet title suit to adjudicate the rights to the use of the

water of the Carson River in Nevada and California. United States v. Alpine Land & Reservoir Co., 503 F.Supp. 877, 878 (D.Nev. 1980). The case was tried before the United States District Court for the District of Nevada and Special Master, John V. Mueller. Id. Mueller drafted certain proposed findings of fact, conclusions of law and decree, which he submitted in June, 1951, when a temporary restraining order was entered reflecting that proposed decree. The United States filed objections to Mueller's report and the court held further trial proceedings to resolve those objections. Id.

Long before this time, one of the many parties to the action, Alpine Land & Reservoir Company, had owned four small reservoirs on upstream tributaries of the East Fork of the Carson River high in the Sierras in California. See 769 F.Supp. at 1143. These historic reservoirs were created in 1895. In the late 1940s and early 1950s, Alpine had expanded the

storage capacities of these reservoirs, after duly having obtained certificates from the State of California authorizing it to do so.

At the time Alpine filed its applications with the California Department of Public Works and obtained the approvals for the increased storage, that Department was the only department or agency which fairly had jurisdiction over such matters. Judge Thompson stated at the District Court hearing that he "would have recognized that proper procedures had been followed to obtain entitlement to the increased storage capacity."

From the dates of construction, Alpine has used the increased reservoir capacities. The parties agree that Alpine notified the Special Master of these certificates and these reservoir expansions. Alpine presented the California Department of Public Works Division of Water Resources certificates evidencing the increased reservoir capacities to the Special Master but he apparently did not make them part of the

evidentiary record. See 769 F.Supp. at 1146. The district court, in hearing Alpine's present petition, concluded that "the proofs persuaded the Special Master to file amended proposed findings of fact, conclusions of law and decree." Id. In fact, the California certificates still exist, were made part of the record below, and are valid and incontestible documentary evidence of the increased reservoir capacities.

On July 14, 1958, Special Master Mueller filed with the court amended proposed findings of fact, conclusions of law and decree. 769 F.Supp. at 1143. Mueller's proposed amended findings, among many other things, expressly recognized and adopted the increased reservoir capacities for the four reservoirs in question here. In so doing, the Water Master failed to supplement the evidentiary record with the California certificates relative to the four reservoirs. This fact was unknown to Alpine. 769 F.Supp. at 1146. At that time the Special

Master supplemented or modified the restraining order in effect to permit, among other things, Alpine's increased storage. 769 F.Supp. at 1142. Over the ensuing years which stretched into decades, Alpine stored water in the four reservoirs at the higher capacities in accordance with the Special Master's 1958 proposed decree.

The United States had a well-known and much-relied upon agreement with the water users to abide by historic practices and customs. The following language from the opinion of Judge Bruce R. Thompson accurately memorializes the United States' longstanding agreement with the other parties to the Alpine litigation:

> Exclusive of pressing the depletion approach, the United States has agreed with all other parties that this Court should recognize the historical customs, practices and agreements by which water has been distributed in the upper river areas. The United States stated many times, both in its briefs and through the testimony of its expert witnesses, that the government had no interest in the daily irrigation practices of the upstream users but rather desires a reasonable quantification of the upstream rights so as to clarify the protection of its

downstream rights.

. . .

> The expert witness for the United States stated several times that the defendants could continue their historic practices as long as net depletion was not increased.

United States v. Alpine Land and Reservoir Co., 503 F.Supp. 877, 889-91 (D.Nev. 1980) (emphasis added).

The United States agreed to allow these historical practices to continue and the Federal Water Master continued to implement and to monitor these storage practices. The agreement was ratified by the Court, and the United States did not appeal the Court's decision. Consequently, the agreement by the United States to abide by historical practices and customs constitutes law of the case. See 503 F.Supp. 877, 889-90. See also Smith Int'l, Inc. v. Hughes Tool Company, 759 F.2d 1572, 1576 (Fed.Cir. 1985); 5 Am.Jur.2d Appeal & Error §744 (1962).

Over 15 years later, the United States finally filed very lengthy objections to the

proposed amended findings of fact and decree on a variety of mostly unrelated grounds. The United States included within its objections an objection to the stated storage capacities of the four reservoirs in question. However, as Judge Thompson found below, there was nothing in the form of any of the United States' objections which would have given specific notice to Alpine that its reservoir capacities were in jeopardy. 769 F.Supp. at 1146. For this reason, Alpine did not participate in any of the proceedings occurring shortly before and leading up to adoption of the Final Decree entered by the court in 1980. Id. As a result of these objections by the United States in 1980, Judge Thompson modified the Special Master's proposed amended findings and decree by, among many other things, listing the reservoir capacities of Alpine's four reservoirs at only their original, lower, amounts when he entered the Final Decree in 1980. 769 F.Supp. at 1143. He did so because he could not find the certificates the

Special Master had been given showing that the reservoirs' capacities had been increased in accordance with permits from the appropriate California department.

Alpine did not appeal from the Final Decree in 1980 because it did not know about the modifications pertinent to it contained within that decree. Alpine did not know the Final Decree stated inaccurate capacities for the reservoirs. Id. Judge Thompson found below that Alpine had acted without fault in that regard. 769 F.Supp. at 1146. He found that there was nothing in the form of the objections (going on some hundred pages) made by the government prior to the entry of the Final Decree which would have given specific notice to Alpine that its reservoir capacities were in jeopardy. 769 F.Supp. at 1146. He ruled that Alpine's conduct was consistent with the exercise of ordinary care under the circumstances. Id.

Had Judge Thompson known of the California

certificates in 1980, and had Judge Thompson then passed upon that issue at trial in 1980, he would have overruled the government's objections and recognized the larger reservoir capacities. 769 F.Supp. at 1146. But the question of the effect of the California certificates was not put in issue then nor passed upon by Judge Thompson. Id.

After Judge Thompson entered the Final Decree, Alpine innocently continued to store water in the four reservoirs at the higher capacities. The United States never objected to these historical practices, although the court's own water master is charged with monitoring them. Therefore, the United States ratified and continued to adhere to its agreement to abide by historical customs and practices.

Not until sometime in 1983 did Alpine have any reason to believe that the Final Decree did not state the larger capacities for the four reservoirs. Apparently in that year, Alpine's president heard that the Final Decree did not

reflect the increased capacities for the four reservoirs. He consulted a friend and attorney, Don Springmeyer, who advised that Alpine "should let sleeping dogs lie, not open up a can of worms." Not being satisfied with that, Alpine's board of directors hired an attorney named E. J. Skeen. Later in 1983, Skeen and Alpine's corporate secretary, a Mr. Aldax, and president, Mr. Robert Kimberling, visited Mr. Claude Dukes, then the court-appointed Water Master charged with administering the Final Decree and overseeing administration of the water system. Dukes stated that the error in the decree could be "remedied administratively." Mr. Dukes also told these three representatives of Alpine "there would be no attempt to stop the utilization of the reservoirs to their fullest capacity."

In early 1984, Mr. Skeen prepared and sent petitions for Alpine along with copies of the California certificates approving the capacity increases to Mr. Dukes. Judge Thompson himself

noted, during the district court hearing, that Mr. Gary Stone, the federal Water Master who replaced Mr. Dukes in late 1984, eventually found these California permits and papers in the files of the Water Master, and could not explain why they were never called to the attention of the court by Mr. Dukes. The United States took no exception with his statement.

Relying on the Water Master's inaction and assurances, Alpine continued to operate the reservoirs as they had during the previous 35 years--at full capacity. They did so without interference by the Water Master. Not until late 1990, over five years later, did Claude Dukes' successor, Water Master Gary Stone, advise Alpine's board that "he might have to cut them back" on the storage in the reservoirs. All these years Mr. Stone had known of Alpine's operation of these reservoirs at full capacity, indeed, had even earlier worked for Alpine in operating these reservoirs. Only then did government officials seek to thwart Alpine's

efforts to correct the errors.

At that point, Alpine promptly contacted counsel who filed the petition from which the present case arises.

REASONS FOR GRANTING THE WRIT

It is important to put the relief requested into its proper perspective. The amendments requested amount to a technical change in storage capacity, not consumptive use, of four small reservoirs. The total increase in storage is 1,743 acre feet per year ("AFY"). By comparison, the total consumptive use of water allocated to the Upper Carson River alone, as reflected in the Final Decree, is some 276,400 AFY. See 503 F.Supp. at 890. Obviously, the relief requested does not greatly affect anyone, except the Petitioner.

Judge Thompson appropriately employed Rule 60(b)(6) to achieve justice in this case. He ordered the Final Decree modified as Alpine requested and, in a well-crafted, principled

decision, showed that the circumstances of this case under governing law merited such a result. The doctrine of res judicata does not prevent the court form granting Alpine the requested relief. Res judicata does not apply if a party moves the rendering court to correct or modify its judgment. Id. at 619. This is exactly the procedure Alpine followed in the present case. Rule 60(b) is one of the several exceptions to the doctrine of res judicata. See 1B Moore's Federal Practice ¶0.407 at pp. 282-83 (2d ed. 1991). Since Alpine's petition satisfied the Rule 60(b) requirements, it was not subject to res judicata preclusion.

Judge Thompson who decided this case had overseen the management of the Carson River for over three decades and had no trouble correctly seeing which result would produce justice in this case. His conviction that the order he entered in this case (and from which the government appealed) was correct, was, to use his word, "unshakable." With his vast

experience in managing that Carson River system, he left intact storage rights which Alpine has exercised for decades with the government's knowledge, agreement and acquiescence. He entered an order which would maintain the status quo and which would not unfairly deprive Alpine of the benefit of the four small reservoirs it had paid to construct and maintain. He amended the decree to achieve a result he would have reached in 1980, but for an error of fact extrinsic to the record in the case at that time. Judge Thompson held that Alpine established facts which entitled it to relief under Rule 60(b)(6) and which justified amendment of the Final Decree he entered in 1980.

In reaching that conclusion, Judge Thompson did not abuse his discretion. He reached this result with a principled application of Rule 60(b)(6). How is it, then, that the three judge panel of the United States Court of Appeals felt constrained to find that extraordinary

"circumstances do not exist in this case"? 984 F.2d 1047. In other words, in what way did Judge Thompson abuse his discretion by granting relief under Rule 60(b)(6)? The answer to these questions is remarkably inconclusive. Although Judge Thompson's decision contained a litany of exceptional circumstances, the Ninth Circuit's Opinion does not address them.

The Ninth Circuit's Opinion, although lacking in focus, refers several times to the perceived delay on Alpine's part in prosecuting this action. The Ninth Circuit Opinion states:

> The record before the district court does not reflect any irregularities in the notice provided to Alpine of the government's 1973 objections. Nor is there any contention that the district court's 1980 decision upholding the government's objection to Alpine's storage entitlement was not properly served on Alpine. The record does not reveal any reason for Alpine's failure to respond to the 1973 objections. Alpine could have sought timely reconsideration of the 1980 decree pursuant to federal Rule of Civil Procedure 59 or other provisions of Rule 60. It appears that Alpine's delay is the result of a misperception of the impact of the government's objections on Alpine's interest. As stated above, the district court nonetheless held that Alpine's neglect was not the result of a lack of

> diligence given the circumstances. The district court apparently believed that requiring an employee of Alpine to read the entire lengthy set of objections and decree so as to know the decree's adverse impact was a burden great enough to render Alpine's delay reasonable. Id.

984 F.2d 1047 (emphasis added). This is mere hyperbole, not legal reasoning. Rule 60(b)(6) is intended for cases involving delay - delay for which the petitioner should not be held responsible.

Res judicata does not bar an inquiry into historical practices and customs of water allocation. See Orr v. Arapaho Water and Sanitation Dist., 753 P.2d 1217, 1225 (Colo. 1988). Under Transgo, Inc. v. Ajac Transmission Parts Corp., 911 F.2d 363, 365 (9th Cir. 1990), cited by Respondents in their opening brief, the Court of Appeals should have applied, but merely gave lip service to, an abuse of discretion standard of review. Since Judge Thompson specifically found that the requisite extraordinary circumstances exist in this case to modify the Final Decree, the Court of Appeals

should not have overturned his ruling unless there clearly was no factual basis. Judge Thompson had the benefit of many years of experience with the Alpine case and the Carson River system when he made his decision. His determination that extraordinary circumstances exist should, accordingly, have been granted great respect and credibility. The litany of extraordinary circumstances contained in Judge Thompson's decision and the agreement of the United States to abide by historical practices and the acquiescence in these practices constitute sufficiently extraordinary circumstances.

The district court properly ruled that Rule 60(b)(6)[4] constituted sufficient authority to

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[4]Fed.R.Civ.P. 60(b) was extensively revised in 1946 due to its deficiencies as originally promulgated, and amended in formal detail in 1948. 6A Moore's Federal Practice ¶60.01[1] at 60-8 (2d ed. 1991) (citations omitted). The sixth "savings clause," as the six clauses of

permit it, as requested by Alpine, to modify the Final Decree entered earlier in this case.[5] 6A

Rule 60(b) are called, provides:

> On Motion and upon such terms as are just, the court may relieve a party of a party's legal representative from a final judgment, order, or a proceeding for the following reasons:. . . (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b)(6). The Notes of Advisory Committee on 1946 Amendments to Rules applicable to Rule 60(b) clearly show that the amendments to this section, the sixth savings clause, were designed to afford relief in situations where such relief would have been available under the common law principles of coram nobis, bills of review, and so forth. 11 Wright & Miller, Federal Practice and Procedure: Civil §2867 at 237 (1973 and Supp. 1991).

[5]There are six subclauses in Rule 60(b). The first five clauses of Rule 60(b) provide for

Moore's Federal Practice ¶60.19 at 60-49-52 (2d ed. 1991). Rule 60(b)(6) comes into play when "exceptional circumstances" exist. In the case of Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863-70 (1988), this Court reaffirmed that a district court may grant relief in "exceptional circumstances" from a final judgment. The facts which will support a finding of exceptional circumstances are clearly within the discretion of the Court.

Citing persuasive authority, Judge Thompson held that the purpose of clause (6) is to

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relief from judgments under specific circumstances. The first three clauses of Rule 60(b) are clearly inapplicable to this case because of lack of factual support and because of the lapse of time, as the court ruled below. 769 F.Supp. at 1144. Furthermore, clauses four and five are inapplicable for the reasons noted by the court, and need not be discussed herein. Id. Section (6) is the only applicable clause.

within the remedial scope of Rule 60(b) the principles justifying relief from a judgment by use of the procedural writs which were expressly abolished but were enforceable at common law. Judge Thompson ruled that the principles underlying the ancient common law writ of coram nobis support Alpine's petition. 769 F.Supp. at 1145-46. The writ of coram nobis was available at common law to correct errors of fact.[6]

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[6]Judge Thompson recognized that, although coram nobis has been frequently invoked in a criminal setting, some courts, including the Federal Court of Appeals had discussed the application of Rule 60(b)(6) to civil litigation. See Bankers Mortgage Company v. United States, 423 F.2d 73 (5th Cir. 1970). See also In the Matter of Brown, 68 F.R.D. 172 (D.C.D.C. 1975). He further noted that the Supreme Court of the United States in United States v. Morgan, 346 U.S. 502 (1954), had declared the writ of error coram nobis to be alive and viable to correct an error of fact in

Coram nobis is now ordinarily employed in exceptional circumstances where the error of fact:

- is extrinsic to, or does not appear in the record;
- affects the validity and regularity of the proceedings;
- was not put in issue at the trial;
- was unknown at the time of the trial to the party seeking relief without fault on his part;
- was unknown to the trial court;
- if known, would have prevented rendition of the judgment.

769 F.Supp. at 1145-46 (quoting 18 Am.Jur.2d Coram Nobis at 629-30.

The Court of Appeals did not even address the coram nobis principles in its Opinion.

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a criminal case despite the remedies covered by 18 U.S.C. §2255. That the contention had been made and rejected that Rule 60(b) had expressly abolished the writ of error coram nobis in both its procedural and substantive aspects was made clear by the first sentence in the dissenting opinion in the Morgan case, as Judge Thompson observed. Thus, the underlying principles of coram nobis remain viable today.

In the present case, as Judge Thompson held, the error was extrinsic to and did not appear in the record. 769 F.Supp. at 1143. The California certificates represented a valid right to store water at an increased capacity granted by the State of California which, at the time, had the power to grant that right. The certificates were extrinsic to the record. Id. The question of the validity of the certificates was not put in issue at the trial. Id. Both Alpine and the trial court were unaware of the circumstances, through no fault of Alpine. Id. Consequently, the court did not pass in 1980 on the question of the certificates. Id. Had the court addressed the question, the court would have upheld the certificated rights, as Judge Thompson expressly held. Id. The district court's decision thus satisfied the elements of the writ of coram nobis.

Exceptional circumstances existed here. Years before the district court entered the Final Decree in this case, the proofs of the

increased reservoir capacities for Alpine's four reservoirs were presented to the Special Master but, inexplicably, the Special Master failed to make them part of the voluminous file and evidentiary record in this case. Those proofs, and other matters of course as they pertained to other portions of the proposed decree, persuaded the Water Master to file amended proposed findings of fact, conclusions of law and decree. The temporary restraining order of the court recognized the increased reservoir capacities, duly authorized and licensed by the appropriate government authority, the California Department of Public Works Division of Water Resources. 769 F.Supp. at 1142. The Water Master correctly recognized that the certificates presented to him had legitimately and duly increased the reservoirs' capacities. For over 20 years after these certificates were presented to the Special Master, Alpine filled these four reservoirs and distributed waters therefrom in accordance with these increased capacities. 769 F.Supp. at

1146. The increased capacities are established by incontestible documentary evidence (the California certificates), and the correction of the factual error present in the Final Decree was therefore not dependant upon the credibility or quality of memory of the witness. Id.

The Court of Appeals found that exceptional circumstances did not exist, noting the Alpine did not pay enough attention to the pleadings. Alpine, as Judge Thompson specifically found, had acted with normal and reasonable prudence. 769 F.Supp. at 1146. Judge Thompson did not abuse his discretion in reaching such conclusions or in making such factual findings. Thus, the Court of Appeals impermissibly substituted its opinion for Judge Thompson's findings of fact.

CONCLUSION

For all of the reasons set forth above, the writ of certiorari should be granted.

DATED: This _____ day of April, 1993.

Respectfully submitted,

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APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant.

v.

ALPINE LAND & RESERVOIR CO.,
Defendant-Appellee.

No. 91-16555

D.C. No.
CV-D-183-BRT

Appeal from the United States District Court
for the District of Nevada
Bruce R. Thompson, District Judge, Presiding

Argued and Submitted
December 10, 1992--Pasadena, California

Filed January 29, 1993

Before: Mary M. Schroeder and
William C. Canby, Jr.,Circuit Judges,
and Ronald S. Lew,*
District Judge.

Opinion by Judge Schroeder

SUMMARY

Civil Litigation and Procedure/Equitable Rememdies/Environmental Law/Res Judicata/Litigation and Procedure (Civil)/Water

The court of appeals reversed and remanded a district court order granting relief after

*Honorable Ronald S.W. Lew, United States District Judge for the Central District of California, sitting by designation.

judgment. The court held on the record, that a party seeking relief from a judgment on grounds of manifest injustice failed to show that circumstances beyond its control prevented timely action to protect its interests.

Appellee Alpine Land & Reservoir Co. increased the storage capacities of its upstream reservoirs under authority of a Special Master's report, which was based in part on evidence never formally made part of the record. The United States filed objections to the Special Master's findings in 1973. In 1980, the findings of the Special Master were modified by the district court, including lowered storage entitlements for Alpine's reservoirs, without Alpine's participation. Alpine continued to operate its reservoirs at full capacity until 1990. When told of possible cutbacks in its authorized capacities, Alpine sought extraordinary relief from the 1980 district court decree.

[1] The court may relieve a party from a

final judgment for any reason justifying relief from the operation of the judgement. [2] Such action is used sparingly as an equitable remedy to prevent manifest injustice, and is to be used where extraordinary circumstances beyond the control of the injured party have prevented it from taking timely action to protect its interests. [3] Such circumstances did not exist here. The complexity of water rights litigation is no reason to hold parties to any lesser standard than litigants in other proceedings, and participants in water cases are as entitled as any other civil litigant to rely on the finality of decrees.

COUNSEL

Barry M. Hartman and David Shilton, United States Department of Justice, Washington, D.C. for the plaintiff-appellant.

Rew R. Goodenow and Robert W. Marshall, Vargas & Bartlett, Reno, Nevada, for the defendant-appellee.

OPINION

SCHROEDER, Circuit Judge:

This matter represents yet another chapter in the litigation over rights to the waters of the Carson and Truckee Rivers. See, e.g., Nevada v. United States, 463 U.S. 110 (1983); United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th Cir.), cert. denied, 464 U.S. 863 (1983). We are here concerned with a 1980 decree that comprehensively adjudicated rights to the use of the waters of the Carson River. That decree set forth, inter alia, the amount of water that Alpine Land & Reservoir Company ("Alpine"), one of the defendants in the adjudication, was entitled to store in each of its four upstream reservoirs. In 1991, Alpine sought a modification of that decree pursuant to Rule of Civil Procedure 60(b)(6) so as to increase its storage rights. The United States now appeals the district court's decision to grant that motion. United States v. Alpine Land & Reservoir Co., 769 F.Supp. 1142 (D.Nev. 1991).

The district court opinion contains most of the background of this dispute. Briefly summarized, the record demonstrates that Alpine has owned the four reservoirs in question since 1895. Alpine increased the storage capacities of the reservoirs in the late 1940s and early 1950s after obtaining the proper certificates from the California State Department of Public Works. The original action regarding the water rights to the Carson River was handled by a Special Master. Alpine submitted the certificates to the Special Master, but they apparently were never made part of the evidentiary record. The Special Master's report, however, contained findings authorizing Alpine to increase the storage capacity of the reservoirs. Alpine continued to utilize the higher capacities.

In 1973, the United States filed objections to the Special Master's findings. One of the objections contested Alpine's reservoir capacity on the ground that there was no evidence in the

record to support the increased capacities. In 1980, the findings of the Special Master were modified by the district court. See United States v. Alpine Land & Reservoir Co., 503 F.Supp. 877 (D.Nev. 1980). The modifications included lowering the storage entitlements of the four Alpine reservoirs. The court did so because it could not find the certificates upon which the Special Master based its finding of increased storage capacity.

Alpine did not participate in the proceedings after 1973, and did not appeal or seek reconsideration of the 1980 judgment until 1991. Alpine argues that it did not know that its reservoir entitlements were in jeopardy before that time. The district court agreed, stating that "[a] careful review [of all the government's objections] by an employee or agent of Alpine would have been required" and that Alpine's failure to do so was "consistent with the exercise of ordinary care under the circumstances." Alpine Land, 769 F.Supp. at

1146.

The facts demonstrate that in 1983 Alpine's president became aware that the 1980 decree changed the findings of the Special Master with regard to the storage entitlements of Alpine's reservoirs. Alpine's board of directors hired an attorney, who, with Alpine's president, met with the court-appointed Water Master who administered the final decree. The Water Master assured Alpine that the error in the final decree would be "remedied administratively."

In 1984 a new Water Master took over. Alpine continued to operate its reservoirs at full capacity until 1990. At that time, the new Water Master advised Alpine that authorized capacity might be cut back. Alpine then instituted the present action.

The record before the district court does not reflect any irregularities in the notice provided to Alpine of the government's 1973 objections. Nor is there any contention that the district court's 1980 decision upholding the

government's objection to Alpine's storage entitlement was not properly served on Alpine. The record does not reveal any reason for Alpine's failure to respond to the 1973 objections. Alpine could have sought timely reconsideration of the 1980 decree pursuant to Federal Rule of Civil Procedure 59 or other provisions of Rule 60. It appears that Alpine's delay is the result of a misperception of the impact of the government's objections on Alpine's interest. As stated above, the district court nonetheless held that Alpine's neglect was not the result of a lack of diligence given the circumstances. The district court apparently believed that requiring an employee of Alpine to read the entire lengthy set of objections and decree so as to know the decree's adverse impact was a burden great enough to render Alpine's delay reasonable. id.

[1] The issue that we must decide is whether the district court abused its discretion by granting relief under Rule 60(b)(6). In

relevant part, Rule 60(b) provides "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons. . .(6) any other reason justifying relief from the operation of the judgment."

[2] Rule 60(b)(6) has been used sparingly as an equitable remedy to prevent manifest injustice. The rule is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment. For example, in Klapprott v. United States, 335 U.S. 601 (1949), the Court upheld the use of the rule to set aside a default judgment in a denaturalization proceeding because the petitioner had been ill, incarcerated, and without counsel for the four years following the judgment. Conversely, in Ackermann v. United States, 340 U.S. 193 (1950), the Court held that Rule 60(b)(6) should not be invoked where the petitioner bypassed his right

to appeal for tactical reasons. In its most recent discussion of the rule, the Supreme Court held that Rule 60(b)(6) relief was available to a litigant against whom judgment was entered by a judge who had improperly refused to recuse himself in the proceeding. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). The Court reiterated that Rule 60(b)(6) relief may be had "to accomplish justice," but only under "extraordinary circumstances." Id. at 864.

Our review of cases in this and other circuits illustrates that the courts of appeal have heeded the Supreme Court's admonitions regarding Rule 60(b)(6); such relief is available only where extraordinary circumstances prevented a litigant from seeking earlier, more timely relief. Although the timeliness of a Rule 60(b)(6) motion "depends on the facts of each case," relief may not be had where "the party seeking reconsideration has ignored normal legal recourses." In re Pacific Far East Lines,

Inc., 889 F.2d 242, 249, 250 (9th Cir. 1989) (holding relief appropriate where new legislation undermined the soundness of the judgment). See also United States v. Holtzman, 762 F.2d 720 (9th Cir. 1985)(five year delay permissible where litigant reasonably interpreted an injunction to authorize litigant's conduct and timely relief was sought upon receipt of notice to the contrary); Rivera v. Puerto Rico Tel. Co., 921 F.2d 393 (1st Cir. 1990)(twenty-three day delay permitted because party not properly notified of pending motion); J.D. Pharmaceutical Distrib., Inc. v. Save-On Drugs & Cosmetic Corp., 893 F.2d 1201, 1207 (11th Cir. 1990)(relief from judgment granted because party never served with requests for admissions or motion for summary judgment). These cases demonstrate that Rule 60(b)(6) relief normally will not be granted unless the moving party is able to show both injury and that circumstances beyond its control prevented timely action to protect its interests.

[3] Those circumstances do not exist in this case. At most, excusable neglect might have been the basis for relief pursuant to Rule 60(b)(1) if Alpine had sought such relief within a year of the 1980 judgment. However, Rule 69(b)(6) is not a substitute for 60(b)(1). Moreover, there is no reason for holding litigants in complex water rights litigation to any lesser standard than litigants in other proceedings. Participants in water adjudications are entitled to rely on the finality of decrees as much as, if not more than, parties to other types of civil judgments. See Nevada v. United States, 463 U.S. at 128-30 (discussing the paramount concerns of finality, especially in water rights cases).

The order of the district court is reversed and the matter remanded for entry of an order denying Rule 60(b)(6) relief.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

THE UNITED STATES OF AMERICA,

Plaintiff, CV-D-183 BRT

v.

ALPINE LAND & RESERVOIR COMPANY
A corporation, et al.,

Defendants.

_____/

D E C I S I O N

The Alpine Land & Reservoir Company (Alpine) has moved to amend the final decree dated October 28, 1980 to reflect the correct storage capacities of four reservoirs: Kinney Meadows (Claim No. 800), Lower Kinney Lake (Claim No. 802), Wet Meadows (Claim No. 803), and Lower Sunset (Claim No. 804). The United States has filed objections.

In this action a temporary restraining order prepared by Special Master John V. Mueller was entered by the court on September 18, 1951. That restraining order specified the capacities

of the aforesaid reservoirs as follows: Kinney Meadows, 435 acre feet; Lower Kinney Lake, 495 acre feet; Wet Meadows, 207 acre feet; Lower Sunset, 250 acre feet. The four reservoirs in question are located in the State of California. The temporary restraining order made no provision for authorizing construction of or increasing or decreasing the storage capacities of such reservoirs.

On August 3, 1950, Alpine filed an application with the State of California Department of Public Works Division of Water Resources to construct works to increase the capacity of Lower Kinney Lake reservoir to 920 acre feet. The application was approved on September 8, 1950, and the approved works were constructed and the capacity increased accordingly.

On April 3, 1952, Alpine filed a similar application to increase the capacity of Wet Meadows reservoir to 450 acre feet and it was approved.

On July 8, 1949, Alpine filed a similar application to increase the capacity of Kinney Meadows reservoir to 900 acre feet and it was approved.

On April 3, 1952, Alpine filed a similar application to increase the capacity of Lower Sunset reservoir to 860 acre feet and it was approved.

On July 14, 1958, the Special Master filed Amended Proposed Findings of Fact, Conclusions of Law and Decree which expressly recognized and adopted the increased reservoir capacities at the four reservoirs in question. Thereafter the court set and reset the dates for filing objections to the report of the Special Master as amended and numerous objections were filed but the objections were never acted upon and resolved until the case was reactivated in the early 1970's. Meanwhile, waters were stored in and diverted from the four reservoirs in accordance with the capacities authorized by the Amended Proposed Findings of Fact, and

Conclusions of Law and Decree filed by the Special Master. This use of water has continued from 1958 until today. The present problem is caused by the fact that when Special Master John V. Mueller entered the amended findings he made no supplementary evidentiary record (i.e. the California certificates) to support the amended findings.

In 1973, an attorney from the Department of Justice visited the court and suggested that this case should be reactivated and concluded. Accordingly, because such a long time had expired and the parties in interest had changed, notices were served and new times were fixed for filing objections to the report and findings and amended report and findings of the Special Master. The United States filed objections to the amended findings and proposed decree respecting the storage capacities of the four reservoirs in question upon the ground that there was no evidentiary support in the record for the increased capacities. Interim

proceedings were had and orders entered resulting in the submission of the objections to the reports and findings of the Special Master on a written record consisting of the exhibits and testimony before the Special Master, supplemented by affidavits and exhibits filed on behalf of the parties and written briefs. The court's rulings on the objections to the Special Master's Findings on Acreage and Priorities were filed (with the Final Decree) on October 28, 1980. During all the foregoing proceedings between 1973 and 1980 Alpine did not participate and failed to come forward with its proofs of increased storage capacity. On January 14, 1991, Alpine, having been apprised of the possibility that it might be restricted to the storage capacities defined in the 1951 temporary restraining order, elected to file the instant petition to amend the Final Decree pursuant to Rule 60(b) Fed.R.Civ.P. and the court's reservation of jurisdiction.

The objections of the United States are

procedural and jurisdictional - most of them sound and well reasoned.

Rule 60(b) Fed.R.Civ.P. provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective

application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by

motion as prescribed in these rules or by an independent action.

Alpine contends that because this court reserved jurisdiction to "modify, amend, eliminate, add to or change any provision of this decree" there is no problem. This is not so. Such reservation of jurisdiction is intended to speak prospectively to enable the court to modify the decree in the light of changed conditions not pertaining at the time of its entry. The provision does not permit relitigation of decided issues, else there would never be any finality to the proceedings. The United States correctly contends that the 1980 Final Decree is res judicata. Nevada v. United States, 463 U.S. 110 (1983).

Alpine suggests that the United State will not be prejudiced, or adversely affected, by the remission of the reservoir capacities to their original entitlement; in a sense, that it has no standing to object. But this is patently not so. Any increase of decreed rights upstream

from Lahontan reservoir will adversely impact the water entitlement of the United States in and below Lahontan reservoir.

Alpine also argues that it has been mislead by officers of the court into a posture of inactivity, and cites inapposite authority in support. Alpine, however, cannot point to a single factor of misrepresentation which resulted in Alpine's failure and neglect to submit its opposition to the government's objections to the reservoir capacities prior to entry of the Final Decree in 1980.

Nevertheless, every judgment and decree of a federal court is pervious to a properly supported motion under Rule 60(b) Fed.R.Civ.P. and in this case, in the opinion of this court, Alpine has established facts which entitle it to relief under Rule 60(b) Fed.R.Civ.P.

There are six (6) subclauses in Rule 60(b). Admittedly, grounds (1), (2) and (3) are inapplicable to this case because of lack of factual support and because of the lapse of

time. Ground (4) "that the judgment is void" is not relevant. Ground (5) that "it is no longer equitable that the judgment should have prospective application" cannot be applied in the light of the decision and discussion in Transgo, Inc. v. Ajac Transmission Parts Corp., 911 F.2d 363 at 365 (1990):

> Many cases since Swift have reiterated Swift's restrictions on the district court's inquiry on a motion to modify a permanent injunction:
>
> > [M]odification is only cautiously to be granted; ... some change is not enough; ... the dangers which the decree was meant to foreclose must almost have disappeared; ... hardship and oppression, extreme and unexpected , are significant; and ... the movants' task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseenness, oppressive hardship,

and a clear showing are the requirements.

Humble Oil & Refining Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir.), cert. denied, 395 U.S. 905, 89 S.Ct. 1745, 23 L.Ed.2d 218 (1969) (emphasis added).

So, we are relegated to ground (6) "any other reason justifying relief from the operation of the judgment."

The government's position with respect to Rule 60(b)(6) is ambiguously argued and difficult to understand. The best we can make of it is that the government contends that the express abolition of writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of bills of review abolished not only those common law remedies but the principles which generated the remedies as well. We adopt the opposite viewpoint and agree with the courts which have held that the purpose of subdivision (6) "any other reason justifying relief from the operation of the judgment: is to

bring within the remedial scope of Rule 60(b) the principles justifying relief from a judgment by use of the procedural writs which were expressly abolished and which were enforceable at common law.

The general principles are stated in authoritative texts:

Federal Practice and Procedure, Wright and Miller, Vol. II, p. 237, § 2867:

> Though the rule puts an end to the niceties of the writs, it retains the substance. Relief is now available, either by motion or in an independent section, in any situation in which it could have been had by one of the ancient remedies. An nomenclature is unimportant, so that an application that is mistakenly designated as being for one of the old writs will be treated as a motion under this rule.

18 Am.Jur.2d "Coram Nobis," p. 633, § 13:

> Coram nobis may be granted only when the record discloses errors of fact of such

fundamental character as to render the proceeding itself irregular and invalid, or to compel action to achieve justice.

The Supreme Court of the United States in United States v. Morgan, 346 U.S. 502 (1954), declared the writ of error coram nobis to be alive and viable to correct an error of fact in a criminal case despite the remedies covered by 28 U.S.C. § 2255. That the contention had been made and rejected that Rule 60(b) Fed.R.Civ.P. had expressly abolished the writ of error coram nobis in both its procedural and substantive aspects is made clear by the first sentence in the dissenting opinion in the Morgan case.

Although coram nobis has been frequently invoked in a criminal setting, there are few opportunities to apply coram nobis in civil litigation. The application of Rule 60(b)(6) to civil litigation was discussed in Bankers Mortgage Company v. United States, 423 F.2d 73 (5th Cir. 1970):

In its present form, 60(b) is a

response to the plaintive cries of parties who have for centuries floundered, and often succumbed, among the snares and pitfalls of the ancillary common law and equitable remedies. It is designed to remove the uncertainties and historical limitations of the ancient remedies but to preserve all of the various kinds of relief which they offered.

In the Matter of Brown, 68 F.R.D. 172 (D.C.D.C. 1975), Rule 60(b)(6) was held applicable to a motion to set aside commitments to a mental hospital.

The substantive requirements of a writ of error coram nobis are correctly stated in 18 Am.Jur.2d "Coram Nobis" pp. 629-30:

> A number of general conditions precedent must exist before coram nobis relief can be granted, regardless of the specific ground or grounds upon which application for

relief is based. Ordinarily coram nobis is employed, in cases where there is no other remedy, for the purpose of reviewing, correcting, or vacating a judgment in the same court in which it was rendered, on account of an error of fact, where such error:

- is extrinsic to, or does not appear in, the record;
- affects the validity and regularity of the proceedings;
- was not put in issue at the trial;
- was unknown at the time of the trial to the party seeking relief without fault on his part;
- was unknown to the trial court;
- was not passed upon by the court;
- if known, would have prevented

rendition of the judgment.

We view this as a proper case for use of coram nobis. There is no other remedy to correct the Alpine Decree because of an error of fact. The error is extrinsic to and does not appear in the record, it was not put in issue at the trial, it was unknown to Alpine at the time of the trial without fault, it was not passed upon by the trial court, and if known the judgment would have been different. Also, exceptional circumstances are here present which "compel action to achieve justice." U.S. v. Morgan (supra).

The exceptional circumstances are these: the proofs of increased reservoir capacities were presented to the Special Master but were not made part of the evidentiary record; the proofs persuaded the Special Master to file amended proposed findings of fact, conclusions of law and decree; the reservoirs were filled and waters therefrom distributed for over twenty years in accordance with the increased

capacities; the increased capacities are established by incontestable documentary evidence (the California certificates), and the correction of factual error is not dependent upon the credibility or quality of memory of any witness.

Probably the weakest link in the chain is a determination of lack of fault or negligence on the part of Alpine. We find, however, that the recitation, supra, of exceptional circumstances establishes justification for Alpine's failure to contest the government's objections to the reservoir capacities. There was nothing in the form of any of the objections made prior to the entry of the Final Decree in this action which would have given specific notice to Alpine that its reservoir capacities were in jeopardy. A careful review by an employee or agent of Alpine of every objection filed would have been required. The standard is ordinary care of a normally careful and prudent person, and in the context of the years of

recognition and compliance with the amended findings and decree, we find Alpine's conduct to be consistent with the exercise of ordinary care under the circumstances.

The government argues that the Final Decree is res judicata and cannot lightly be subjected to Rule 60(b) motions to modify. We agree. It is a strange and unusual case, indeed, which will justify the invocation of Rule 60(b)(6) to correct an error. Only where the correct duty of water and use of water were recognized by the temporary restraining order, and the supporting proofs are documentary and conclusive, will corrective action be considered. This is such a case. It represents a very slight breach in the dike of res judicata.

In consideration of the premises,

IT HEREBY IS ORDERED, ADJUDGED AND DECREED that the Alpine Final Decree entered on October 28, 1980 hereby is amended as follows:

Claim Number 800 Kinney Meadows Reservoir, the reservoir capacity acre feet is increased to

900 acre feet.

Claim Number 802 Lower Kinney Lake Reservoir, the reservoir capacity acre feet is increased to 920 acre feet.

Claim Number 803 wet Meadows Reservoir, the reservoir capacity acre feet is increased to 450 acre feet.

Claim Number 804 Lower Sunset Reservoir, the reservoir capacity acre feet is increased to 860 acre feet.

DATED August 1, 1991.

/s/ Bruce A. Thompson

UNITED STATES DISTRICT JUDGE

VII. JUDGMENT

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or ommission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1)

mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to

relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(2)

No. 92-1741

In the Supreme Court of the United States

OCTOBER TERM, 1993

ALPINE LAND AND RESERVOIR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

Supreme Court, U.S.
FILED
JUL 6 1993
OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to relief under Fed. R. Civ. P. 60(b)(6) that would modify a final water-rights decree to increase the amount of water petitioner was permitted to store in its reservoirs.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1741

ALPINE LAND AND RESERVOIR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-12A) is reported at 984 F.2d 1047. The opinion of the district court (Pet. App. 1B-19B) is reported at 769 F. Supp. 1142.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1993. A petition for rehearing was denied on March 15, 1993. The petition for a writ of certiorari was filed on April 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner moved under Fed. R. Civ. P. 60(b) to modify a final water-rights decree in order to increase the amount of water it was permitted to store in its reservoirs. Pet. App. 1B. Prior to entry of the decree, however, the United States had specifically objected to the increased storage rights sought by petitioner, and the district court had sustained the United States' objection. Petitioner did not seek reconsideration of that ruling or challenge it on appeal. Pet. App. 5A-6A. Nonetheless, the district court below granted post-judgment relief to petitioner under Fed. R. Civ. P. 60(b)(6), holding that petitioner could not reasonably have been expected to read the court papers in which the United States raised its objection. Pet. App. 16B-18B. The court of appeals reversed, holding that petitioner's failure to read the court papers was not an exceptional circumstance warranting relief under Rule 60(b)(6).

1. In 1925, the United States brought a quiet title action to adjudicate rights to the waters of the Carson River, which runs eastward from the Sierra Nevada mountain range in California to the Lahontan Reservoir in central Nevada, where it joins with water from the Truckee River Diversion Canal. See *United States* v. *Alpine Land & Reservoir Co.*, 697 F.2d 851, 852-853 (9th Cir.), cert. denied, 464 U.S. 863 (1983); Gov't C.A. Br. 4. Petitioner, which owns four reservoirs on the upstream reaches of the Carson River, was one of the parties to the quiet title action. In the late 1940s and early 1950s, petitioner obtained certificates from California authorizing it to expand (approximately to double) the storage capacities of its reservoirs. Pet. App. 1B-3B. In 1958, the Special Master assigned to the case issued a report entitled "Amended Proposed Findings of Fact, Conclusions of Law and Decree" that recognized the increased capac-

ities of petitioner's reservoirs and proposed that petitioner be permitted to divert and store water at the increased levels. The Special Master did not, however, supplement the record to include the state certificates evidencing the increased storage capacities of petitioner's reservoirs. The case then remained in abeyance until 1973, when it was reactivated at the government's request. *Id.* at 3B-4B.

In 1973, the United States filed objections to the Special Master's proposed findings and decree. Of relevance here, the United States specifically objected to petitioner's claims for storage rights, contending that the proposed findings regarding the increased storage capacities of petitioner's reservoirs were not supported by any evidence in the record. Pet. App. 4B. Petitioner did not respond to the government's objections. C.A. Exc. Rec. 41-42. Accordingly, the district court sustained the objections in its "Rulings on Specific Objections to the Special Master's Findings on Acreages and Priorities," issued in December 1980. *Id.* at 5-6, ¶¶ 42, 44-46 (ruling on Claims 800, 802, 803, and 804). The court's final decree, also entered in 1980, authorized petitioner to divert and store water only at the pre-expansion capacities of its reservoirs. Pet. App. 6A. Petitioner did not seek reconsideration of that aspect of the final decree or challenge it on appeal. *Ibid.*

2. In 1991, petitioner moved under Fed. R. Civ. P. 60(b) to reopen and modify the final decree to increase the amount of water it was permitted to store in its reservoirs. Petitioner claimed that it did not discover that the final decree limited its storage rights to pre-expansion levels until 1983, at which point it petitioned the Special Master for administrative amendments to the decree. C.A. Exc. Rec. 46-48. Although the Special Master never ruled on those petitions, petitioner took no further action until 1991, when the new Special Master advised it

that he might have to limit its use of water to comply with the final decree. *Id.* at 48.

The district court granted petitioner's motion, holding that relief was warranted under Fed. R. Civ. P. 60(b)(6). Pet. App. 1B-19B.[1] The court recognized that a party seeking relief under Rule 60(b)(6) must show, *inter alia*, that it was without fault in failing to seek relief prior to the entry of judgment. Pet. App. 15B-16B. The court also recognized that the absence-of-fault requirement pointed up "the weakest link" in petitioner's case, given its failure to respond to the government's objections or to challenge the court's rulings sustaining those objections. Nonetheless, the court determined that, in order to discover the government's objections, "[a] careful review by an employee or agent of [petitioner] of every objection filed would have been required." Pet. App. 17B. In the court's view, that level of scrutiny exceeded what was required under a standard of "ordinary care." *Id.* at 17B-18B.

3. The court of appeals reversed and remanded the case "for entry of an order denying Rule 60(b)(6) relief." Pet. App. 12A. The court observed that "Rule 60(b)(6) relief normally will not be granted unless the moving party is able to show both injury and that circumstances beyond its control prevented timely action to protect its interests." *Id.* at 11A. The court found no such circumstances here to justify petitioner's failure to seek timely relief from the provisions in the 1980 decree that restricted petitioner's storage rights to pre-expansion levels:

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[1] The court initially held that the five grounds for relief set out in Fed. R. Civ. P. 60(b)(1)-(b)(5) were inapplicable. Pet. App. 9B-10B. Petitioner did not challenge that holding in the court of appeals and does not challenge it in this Court. Pet. 24 n.5. Rule 60(b)(6) is a residual provision, authorizing relief for "any other reason justifying relief from the operation of the judgment."

> The record before the district court does not reflect any irregularities in the notice provided to [petitioner] of the government's 1973 objections. Nor is there any contention that the district court's 1980 decision upholding the government's objection to [petitioner's] storage entitlement was not properly served on [petitioner]. The record does not reveal any reason for [petitioner's] failure to respond to the 1973 objections.

Id. at 7A-8A. The court of appeals rejected the district court's reliance on its "apparent[] belie[f] that requiring an employee of [petitioner] to read the entire lengthy set of objections and decree so as to know the decree's adverse impact was a burden great enough to render [petitioner's] delay reasonable." *Id.* at 8A. First, the court of appeals determined, the large volume of court papers "[a]t most" supported a claim of "excusable neglect" under Rule 60(b)(1), but "Rule 6[0](b)(6) is not a substitute for 60(b)(1)." *Id.* at 12A. In any event, the court of appeals found "no reason for holding litigants in complex water rights litigation to any lesser standard than litigants in other proceedings"; on the contrary, "[p]articipants in water adjudications are entitled to rely on the finality of decrees as much as, if not more than, parties to other types of civil judgments." *Ibid.* (citing *Nevada* v. *United States*, 463 U.S. 110, 128-130 (1983)).

ARGUMENT

1. Petitioner contends (Pet. 17-29) that the court of appeals erred in holding that it was not entitled to relief under Fed. R. Civ. P. 60(b)(6). The court of appeals' holding is correct, however, and petitioner's fact-bound contention to the contrary does not warrant further review.

This Court has made clear that relief under Rule 60(b)(6) is available only when relief under subdivisions (1) to (5) of Rule 60(b) is not available and "exceptional

circumstances" exist. *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 863-864 & n.11 (1988); see also *Klapprott* v. *United States*, 335 U.S. 601, 613-615 (1949); *Ackermann* v. *United States*, 340 U.S. 193, 199 (1950). "Of particular importance" in determining the existence of exceptional circumstances, the Court has said, is whether the case "involv[es] neglect or lack of due diligence" by the moving party. *Liljeberg*, 486 U.S. at 863 n.11.

Here, the court of appeals correctly concluded that petitioner was guilty of neglect and lack of due diligence in failing to seek relief prior to entry of the final water-rights decree. As the court observed, petitioner did not contend that there were "any irregularities" in the notice provided to it of the government's 1973 objections to its claims for storage rights. Pet. App. 7A. In those objections, the government specifically challenged petitioner's claims on the ground that the record did not support the increased storage capacities recited in the Special Master's proposed findings. *Id.* at 5A-6A. Thus, if petitioner had read the government's objections, it would have had clear notice that the record did not contain the California certificates evidencing the increased storage capacities of its reservoirs, and it could have remedied that problem before the decree became final.

The district court recognized that, if petitioner had conducted "[a] careful review" of the government's objections, it would have discovered that the certificates were not in the record. Pet. App. 17B. Nonetheless, the district court did not believe that such a review was required in the exercise of ordinary care. *Id.* at 17B-18B. The court of appeals properly rejected that view, stating that "there is no reason for holding litigants in complex water rights litigation to any lesser standard than litigants in other proceedings." *Id.* at 12A. The court of

appeals correctly recognized (*ibid.*) that the district court's view conflicted with traditional policies of finality, which are "perhaps * * * at their zenith in cases concerning real property, land and water." *Nevada* v. *United States*, 463 U.S. 110, 129 n.10 (1983).[2]

In any event, petitioner's lack of due diligence did not end with its failure to respond to the government's objections; in addition, petitioner unreasonably failed to seek reconsideration of the court's rulings on the government's objections or to challenge those rulings on appeal. Even the district court below did not suggest that it was reasonable for petitioner to neglect to read

[2] Finality concerns have special force with respect to the final decree in this case. The Carson River flows and Truckee River flows, both of which supply the Newlands Reclamation Project, have been the subject of numerous lawsuits, regulatory actions, and a congressional settlement Act. See Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, Tit. II, 104 Stat. 3294-3324 (1990); 43 C.F.R. Pt. 418; *United States* v. *Alpine Land & Reservoir Co.*, 887 F.2d 207, 210 n.2 (9th Cir. 1989), cert. denied, 498 U.S. 817 (1990); *Pyramid Lake Paiute Tribe of Indians* v. *Hodel*, 882 F.2d 364, 366-367 (9th Cir. 1989); *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972). In 1988, the Secretary of the Interior developed Final Operating Criteria and Procedures (OCAP) for the Newlands Project, which provides that the Project will be supplied by Carson waters in accordance with the 1980 decree at issue here and to the maximum extent such waters are available, in order to minimize the use of waters from the Truckee River, the other available source. Gov't C.A. Br. 16. The 1988 OCAP recognizes that if shortages of Carson waters supplying the Newlands Project are compensated by diversions of additional waters from the Truckee, downstream water needs on both the Carson and the Truckee could be affected. Those needs include the maintenance of endangered and threatened fish species at Pyramid Lake, which is the terminus of the Truckee River and encompassed by the reservation of the Pyramid Lake Paiute Tribe of Indians. See *Nevada* v. *United States*, 463 U.S. at 115-116; *United States* v. *Alpine Land & Reservoir Co.*, 887 F.2d at 208.

the court's rulings.[3] Those rulings plainly stated that there was no evidence to support the increased storage rights sought by petitioners, and they expressly limited petitioner's storage rights to pre-expansion levels.[4] Thus, the district court's rulings gave petitioner further notice that the record did not contain the California certificates and that it should remedy that deficiency before the 1980 decree became final. Petitioner has offered no excuse for its failure to do so; it merely states that "it did not know about the modifications * * * contained within [the final] decree." Pet. 13. The court of appeals properly refused to relieve petitioner of the consequences of its failure to protect its rights in a timely manner.[5]

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[3] Contrary to petitioner's assertion (Pet. 13), the district court did not find that petitioner was "without fault" in failing to challenge the final decree. The district court's finding as to the absence of fault related solely to petitioner's failure to respond to the government's objections. Pet. App. 17B-18B. Moreover, as discussed in the text, that finding was based on the mistaken view that petitioner was not required in the exercise of ordinary care to read the government's objections.

[4] For example, the district court ruled with respect to petitioner's claim No. 802, regarding Lower Kinney Lake:

> The government's objection to the increased capacity in the amended finding is sustained. The capacity shall be 495 acre-feet. Neither Ex. 273 nor any other evidence supports the amended finding.

C.A. Exc. Rec. 5 (¶ 44); see also *id.* at 5-6 (¶¶ 42, 45, and 46, sustaining government's objections to Claim Nos. 800, 803, and 804). The final decree likewise set the capacity for Lower Kinney Lake at 495 acre-feet, the pre-expansion capacity. *Id.* at 15.

[5] As the court of appeals observed, petitioner's failure to protect its rights by responding to the government's objections or challenging the final decree, considered most favorably to petitioner, might have supported relief under Rule 60(b)(1) for "excusable neglect." Pet. App. 12A. Motions under Rule 60(b)(1),

Although petitioner criticizes the court of appeals for ignoring "a litany of exceptional circumstances" (Pet. 20), none of the circumstances cited by petitioner justified relief under Rule 60(b)(6). Petitioner first asserts that the relief it requested "does not greatly affect anyone." Pet. 17. The district court correctly rejected that assertion, noting that "[a]ny increase of decreed rights upstream from Lahontan reservoir will adversely impact the water entitlement of the United States in and below Lahontan reservoir." Pet. App. 8B-9B. Petitioner next asserts that it stored water at post-expansion levels "with the government's knowledge, agreement and acquiescence." Pet. 19. There is no evidence in the record, however, that the government was aware of the amount of water petitioner was using. Finally, petitioner contends (Pet. 19) and the district court determined (Pet. App. 16B) that the Special Master's failure to include the California certificates in the record was an error "extrinsic to the record." The government's objections to petitioner's claims and the court's rulings on those objections *were* part of the record, however, and, as discussed earlier, they made it plain that the certificates had not been included in the record.

In sum, this is not a case in which a party was prevented from seeking timely relief by extraordinary circumstances beyond its control. For that reason, the court of appeals properly held that relief under Rule 60(b)(6) was unwarranted.

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however, must be made within one year of entry of the judgment; petitioner filed its motion 11 years after entry of the judgment and therefore was not entitled to relief under that provision. Petitioner cannot obtain relief for excusable neglect under Rule 60(b)(6), because relief under that provision cannot be "premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Liljeberg*, 486 U.S. at 863.

2. Petitioner further claims (Pet. i, 10-11, 21) that its use of water was authorized by the government's alleged "agreement" to abide by historical practices and customs of water distribution. Neither the court of appeals nor the district court adverted to this claim, and it does not appear that petitioner raised it below. In any event, the claim lacks merit.

Petitioner traces the alleged agreement to the district court's statement in a prior opinion that "the United States has agreed with all other parties that this Court should recognize the historical customs, practices and agreements by which water has been distributed in the upper river areas." *United States* v. *Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 889-891 (D. Nev. 1980), aff'd as modified, 697 F.2d 851 (9th Cir.), cert. denied, 464 U.S. 863 (1983). The court thereafter observed, however, that the United States sought "a reasonable quantification of the upstream rights so as to clarify the protection of its downstream rights." 503 F. Supp. at 890.

The 1980 decree provided the quantification sought by the United States. In doing so, the decree took into account, *inter alia*, existing upstream uses. As discussed above in Point 1, petitioner had ample opportunity to challenge the decree's quantification of its rights before the decree became final. Petitioner cannot now, 13 years later, rely on an alleged practice of using greater amounts of water than permitted under the decree as a basis for reopening and modifying the decree.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-1741

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ALPINE LAND AND RESERVOIR COMPANY,
petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States' failure to adhere to a long-standing agreement to abide by historical practices and customs of water distribution constitutes extraordinary circumstances justifying relief under Fed.R.Civ.P. 60(b)(6).

2. Whether the Court of Appeals improperly substituted its view of the facts for the District Court's findings of fact on the issue of exceptional circumstances.

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ISSUES ADDRESSED

The Brief for the United States in Opposition filed in this proceeding raises an issue entirely different from the issues stated in Alpine Land and Reservoir Company's ("Alpine") Petition for Writ of Certiorari. Compare Pet.App. i, with Resp.Opp. I. The United States then argues the law applicable to its chosen issue as applied to the "facts" of the case, while ignoring the essential issue, which is whether the Court of appeals improperly substituted its version of the facts for the District Court's findings of fact. In accordance with Supreme Court Rule 15.6, this Reply discusses matters first raised by the United State's "restatement" of the issue and attempts to refocus the issues.

DISCUSSION

The Ninth Circuit Court of Appeal's reversal of the District Court's Decision dated August 1, 1991 is based upon findings of fact,

not law, yet it made no finding that the District Court findings of fact were clearly erroneous. The Court of Appeals simply substituted its findings of fact for Judge Thompson's. The United States has, inaccurately, framed the focus of this Petition as an issue of law.

1. The parties agree that relief under Rule 60(b)(6) is available only when relief under subdivisions (1) through (5) of Rule 60(b) is not available and when "exceptional circumstances" exist. See Resp.Op. 5-6. The United States suggests[1] that Rule 60(b)(1) relief may have been appropriate in this case, but does not contend that Rule 60(b)(1) is exclusively applicable or show why this would be so. The Court of Appeals' Opinion[2] also suggests that Rule 60(b)(1) "might have been the basis for relief pursuant to Rule 60(b)(1)...",

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[1] Resp.Op. 8-9 n. 5.

[2] Pet. App. 12A.

but does not explain why this is so. Judge Thompson specifically ruled that Rule 60(b)(1) was not applicable. Pet. App. 9B-10B. Consequently, the only pertinent factual inquiry concerns whether Judge Thompson's finding that "exceptional circumstances" exist was clearly erroneous.

The District Court specifically found that exceptional circumstances did exist. Pet. App. 16B. The Court of Appeals did not find that the District Court misperceived or misapplied the law or that it failed to make findings of fact essential to a proper resolution of the legal question. Regardless of the arguments for reversing the District Court set forth in the Court of Appeals' Opinion, the reversal could only be based upon a finding that the District Court's findings of fact were "clearly erroneous." See Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986). The Court of Appeals found: "[t]hose circumstances do not exist in this case." Pet. App. 12A. It

did so without making a specific finding and stating its reasons therefore why the District Court's Decision was "clearly erroneous" and without making any reference to the applicable standard on appeal set forth in Rule 52(a).[3]

Federal courts of appeal are to review factual findings for clear error. See, e.g., United States v. Taylor, 487 U.S. 326, 337 (1988); Simon v. Intercontinental Transport, 882 F.2d 1435, 1439 (9th Cir. 1989). The Court has granted certiorari in a case very similar, in terms of the procedural issues raised, to the present case. See Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986). In Icicle, the Court granted certiorari to consider whether the court of appeals applied the appropriate standard of review in passing on the district

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[3] Fed. R. Civ. Proc. 52(a) reads, in relevant part, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

court's judgment. Id. at 710. The Ninth Circuit Court of Appeals had reversed the district court's findings of fact. Id. The Court of Appeals proposed to "apply a de novo standard of review to the application of exemption to the facts and to review the facts under a clearly erroneous standard." Id. at 713 (quoting 774 F.2d at 352, citing United States v. McConnery, 728 F.2d 1195, 1202 (9th Cir.)(en banc), cert. denied, 469 U.S. 824 (1984)). Finding that the questions presented were questions of fact, as they are in the present case, the Court vacated the Court of Appeals' judgment and remanded for further proceedings. Id. at 715.

The Court held that the following options are available the courts:

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to

> the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own.

Id.

The Court of Appeals has done exactly what the Court instructed it not to do in Icicle, it has made its own findings of fact. This is the primary issue raised by this petition. The Court has previously granted certiorari in cases raising questions similar to those presented in

this Petition.[4]

2. The United States claims that the arguments regarding the government's agreement to abide by historical practices and customs were not raised below. This is not so. This argument was fully briefed and argued in connection with Alpine's petition for rehearing to the Court of Appeals.

3. The United States has argued that "finality concerns" militate against the relief requested. Resp.Op. 7. The purpose of finality is reliance. Here, that purpose is served better by Alpine's requested relief than by the United State's insistence on the technical terms of the Final Decree, since the reservoirs have been managed according to the amounts Alpine wants the Court to recognize, for many years, and since entry of the decree at the requested

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[4] See, e.g., Dennison Mfg. Co. v. Panduit Corp., 475 U.S. 809 (1986); Icicle, 475 U.S. 709 (1986).

storage capacities would not effect a change. Alpine is simply asking that practice be recognized (as was the government's agreement). The United States is asking for a change in the status quo. Contrary to the United States' assertion, it's representative, the Water Master, was charged with regulating the flow of water and, therefore, had to know the amount of water being used. Thus, maintaining the status quo does not result in unfairness to the United States. The Court has previously stated that the parties' course of conduct under a water rights decree may be relevant. See Nebraska v. Wyoming, 507 U.S. ____, 113 S.Ct. ____, 123 L.Ed. 2d 317, 330 (1993). Course of conduct here graphically illustrates unfairness to Alpine.

CONCLUSION

A decision for the United States in this case deprives Alpine of water storage which it bought, paid for, and relied upon for decades.

Four of Alpine's eight reservoirs are affected by the outcome of this case. The many exceptional circumstances cited by the District Court justify the relief Alpine seeks under Rule 60(b)(6).

The Court of Appeals failure to find that the District Court's Decision was clearly erroneous or state why it was clearly erroneous supercedes consideration of the merits of the issue raised by the United States. The fact that the Court of Appeals substituted its view of the facts for the District Court's findings of fact on the issue of exceptional circumstances constituted clear error and warrants the Court's granting certiorari.

DATED: This _____ day of August, 1993.

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